THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

R.A.W. Investments Trust, Inc.

v.

Town of Warner Planning Board

No. 03-E-402

OPINION AND ORDER

LYNN, C.J.

The plaintiff, RAW Investments Trust, instituted this action pursuant to RSA 677:15 (Supp. 2003) to challenge the decision of the planning board (board) of the defendant Town of Warner (town) denying site plan approval for a commercial development of property owned by plaintiff in the town. On November 12, 2003, the court (Fitzgerald, J.) issued a writ of certiorari, and the town subsequently filed a certified record of the proceedings before the board. The undersigned justice held a hearing on the matter on March 22, 2004. Based on my review of the entire record and consideration of the arguments of the parties, I conclude that the board's decision must be affirmed.

I. STANDARD OF REVIEW

RSA 677:15, V sets forth the standard of review that governs my consideration of the board's ruling. It provides:

> V. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.

See also Route 12 Books & Video v. Town of Troy, 149 N.H. 569, 574 (2003) ("When reviewing a planning board decision, the trial court must determine on the record before it whether the decision is unreasonable or erroneous as a matter of law.").

II. FACTUAL BACKGROUND

On October 16, 2000, the board approved plaintiff's application to subdivide into several lots property owned by plaintiff at the intersection of I-89 (exit 9) and route 103. Because the property was below grade and included areas of wetlands, the approval was subject to numerous conditions. On August 22, 2001, the board allowed plaintiff to commence work on the property. According to plaintiff, between that date and January 2003 it expended approximately $400,000.00 in site work to prepare the property for commercial development. The work included installing fill, grading, and constructing a retaining wall and driveways. On January 6, 2003, the board informed plaintiff that its "Final Site Plan for a three (3) lot Subdivision . . . ha[d] been approved. . . ." (Emphasis added.)

On May 5, 2003, plaintiff met with the board for a preliminary consultation regarding plaintiff's application for site plan approval to construct two 10,000 square foot commercial buildings on lots 1 and 2 of the subdivision. At this meeting, plaintiff informed the board that it intended to construct the buildings facing route 103 and with parking in front of the buildings. Plaintiff indicated that it felt this manner of orienting the buildings and parking areas was necessary given the retail nature of the businesses that would occupy the buildings, as well

as the desire to facilitate loading, parking and fire access to the property. The board expressed some concerns regarding building orientation and parking, and suggested that plaintiff review amendments to its site plan review regulations which had been adopted by the board earlier at that same May 5th meeting. These amendments specified that orienting buildings facing the road with parking in front is "not desirable;" that buildings and parking areas aligned perpendicular to the road are "better;" and that the "preferred" method is to have buildings face away from the road with parking located in the rear.

On May 14, 2003, plaintiff formally submitted its site plan application to the board. Despite the board's expressed concerns about building orientation and parking, the plan continued to show the buildings facing the road with parking in front. Between May 14 and October 6, 2003, plaintiff and the board held a series of meetings and public hearings regarding the application. Although a number of issues in addition to building orientation and parking were discussed during these meetings, the record reflects that the project's non-compliance with the amended design regulations was raised repeatedly by both board members and members of the public and was obviously a major point of contention. On August 4, 2003, the board retained Provan and Lorber, consulting engineers, to review the application. Following its review, the firm reported to the board that although "the parking as shown [on the site plan application] does not meet the [board's] requirements, . . . in looking at the site and site development, we can certainly support the parking as shown by the applicant." Nonetheless, on October 6, 2003, the board voted to deny site plan approval because "the orientation of the

buildings . . . [was] not in line with the preferred orientation as set forth in the design standards of . . . [the board's] regulations." Plaintiff then filed the present action.

III. DISCUSSION

Plaintiff advances two arguments in support of its claim that the board's decision should be reversed. First, plaintiff asserts that it obtained a vested right to complete the project in accordance with its site plan application because, subsequent to the board's grant of subdivision approval but before the site plan regulations were amended to address the matter of building and parking orientation, plaintiff had completed substantial construction work on the project. However, in making this argument, plaintiff improperly attempts to conflate subdivision approval and site plan approval into a single process. Under New Hampshire law and the board's regulations, these are two separate and distinct regulatory procedures, both of which must be completed before a commercial development, such as that at issue, can be undertaken. Compare RSA 674:35 and :36 with RSA 674:43 and:44; see Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning § 30.03 (2000). The site preparation activities undertaken by plaintiff in connection with obtaining subdivision approval was work that plaintiff was required to do in order to divide its property into separate lots and to develop the property for any use. Plaintiff has offered no evidence indicating that, in connection with its granting of subdivision approval, the board ever said or did anything which could reasonably be construed as a commitment that plaintiff could proceed with the erection of the two particular 10,000 square

foot buildings configured as shown in the site plan application. Indeed, the record before me contains no evidence that the board was even aware of plaintiff's specific building plans at the time it granted subdivision approval.

The cases cited by plaintiff in support of its position are readily distinguishable from the matter sub judice. Both Henry and Murphy, Inc. v. Town of Allenstown, 120 N.H. 910 (1980) and AWL Power v. City of Rochester, 148 N.H. 603 (2002), involved situations wherein the developer had obtained all required regulatory approvals necessary to proceed with their projects before the ordinance amendments were enacted. Here, that is not the case. The requirement that plaintiff obtain site plan approval for a commercial development was in effect before plaintiff began any work on its property, and the site plan regulations were amended prior (albeit immediately prior) to the time plaintiff submitted its application for site plan review. If plaintiff desired to "lock-in" its right to develop the project using a particular building design or configuration it presumably could have filed for subdivision approval and site plan approval contemporaneously, and awaited both approvals before undertaking any substantial work on the project. Had it followed this course, and had it performed substantial work on the project with approvals in hand that did not address the issue of building or parking orientation, plaintiff's vested rights argument might well be compelling. But because plaintiff chose to proceed with the filling, grading and other preparatory work without obtaining site plan approval for the construction of particular buildings, plaintiff took the risk that the site regulations

could change before such approval was granted. See Quirk v. Town of New Boston 140 N.H. 124, 132-33 (1995).

This case is distinguishable from those on which plaintiff relies for another reason as well. In both Henry and Murphy and AWL it was clear that the post-hoc zoning amendments substantially reduced the value of the developers' investments. See Henry and Murphy, 120 N.H. at 914 (indicating that court may consider diminution in value resulting from zoning change in determining if landowner's rights have vested). No such showing has been made here. While there is no doubt that plaintiff spent a substantial sum – approximately $400,000.00 -- to prepare the property for development, plaintiff failed to present the board with any concrete evidence indicating exactly how it would be adversely impacted if it was required to reconfigure its buildings to comply with the "preferred" or "better" orientation regimes contained in the amended regulations. The record contains nothing more than vague statements by plaintiff's representatives that reorienting the buildings would entail "thousands of dollars of additional fill and grading work." The board was not required to accept such conclusory assertions.

Plaintiff's second argument is that the board's decision is unreasonable because it is not supported by the evidence. In support of this argument, plaintiff notes that, even under the new site plan regulations, orientation of buildings toward the street is not prohibited. While this is true, given the fact that the regulations discourage developments with buildings and parking lots facing the street, the board was entitled to insist, at the very least, that plaintiff show there

were good and substantial reasons which prevented it from following an alternative design more in keeping with the preferred methodology. Again, however, the record reflects that plaintiff provided the board with little of substance addressing this issue. Aside from claiming that the (unspecified and ever changing) retail businesses that would occupy the buildings made it necessary to orient them toward the road, and making various non-specific assertions that re-configuring the buildings or parking areas would reduce space and accessibility, plaintiff offered no evidence that they gave serious consideration to any alternative designs. As board member St. Pierre aptly observed just prior to the final vote:

> I would like to make it clear to the applicant that the orientation as proposed is not prohibited. It is not desirable, but it is allowed. I think in order for the Board [to] consider approval, the applicant needs to demonstrate that based on the lay of the land, this is the only option open to them. In this particular situation, I think the applicant has made some points on why they would like to do that, but they haven't shared with the Board any alternatives that were discussed or considered and rejected by them.

Certified Record, tab 44, p. 12. In addition, the record contains a report from the Central New Hampshire Regional Planning Commission, which indicates that locating the buildings in the lower rear portion of the lots would make the building basements more susceptible to flooding than would be the case if the parking areas were situated at the rear of the lots. Id. tab 24, pp. 4-5. Under these circumstances, the board could reasonably find that plaintiff had shown no legitimate reason for failing to comply with a more favored design approach.

Finally, having reviewed the entire record, I can find no support for plaintiff's claim that the board breached its duty to provide reasonable assistance

to an applicant seeking land use approvals. See Richmond v. City of Concord, 149 N.H. 312, 315-16 (2003).

IV. CONCLUSION

For the reasons stated above, the decision of the board denying plaintiff's application for site plan approval is hereby affirmed.

BY THE COURT:

April 30, 2004

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ROBERT J. LYNN
Chief Justice